IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 743 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAYVARDHAN @ MUNIYO JAKHARIA CHRISTIAN,

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 743 of 2003

MR HR PRAJAPATI for Petitioner No. 1

MS. PAURAMI SHETH, LD. APP for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE N.G.NANDI

Date of decision: 22/01/2004

ORAL JUDGEMENT

1. By this petition under Article 226 of the Constitution of India the petitioner has been challenging the order dated 16-4-2003 passed by Dy. Commissioner of

Police, Zone-V, Ahmedabad City, exercising powers under section 56 of the Bombay Police Act, externing the petitioner for a period of two years from Ahmedabad City, Ahmedabad (Rural), Gandhinagar, Kheda and Mehsana districts.

It is submitted by Mr. H.R. Prajapati, learned advocate for the petitioner that no appeal under section 60 of the Bombay Police Act could be filed as the appeal could not be preferred in time, and there is no provision for condonation of delay and therefore, the present petition has been filed without exhausting the remedy of statutory appeal. It is further submitted that in the show cause notice there is no allegation of the petitioner operating with the aid and help of the associates and there is no material to show that the petitioner has been indulging in such activities in the contiguous districts from which also he has been ordered to be externed by the impugned order. It is further contended that, there is no allegation in the show cause notice that the petitioner has been indulging in the acts alleged in the contiguous districts and that the petitioner has not been supplied any material so that the petitioner could make effective representation to the show cause notice.

It is further contended that the allegations levelled against the petitioner are vague as to the time and the period and there is no specific incident alleged against the petitioner and that the allegations are absolutely general in nature. Thus the petitioner has been challenging the order on the submissions aforestated.

2. It is submitted by Ms. Paurami Sheth, learned APP that, in the show cause notice it has been brought to the notice of the petitioner - externee about the acts alleged against him and the areas in which he has been indulging in the activities alleged, also pointing out that since October 2002 the petitioner has been indulging in such acts and that what the witnesses have stated against the petitioner has been pointed out in the show cause notice so as to give an opportunity to the petitioner to file his representation, and if at all the petitioner wanted to file the representation, he could have made the representation to the allegations levelled against him in the show cause notice. It has been fairly stated by learned APP that in the show cause notice there is no reference to "associates" with whom the petitioner is said to have been operating. It is further submitted that the petitioner would not be entitled to the

discretionary relief under Article 226 of the Constitution of India in as much as the petitioner has not exhausted the remedy of statutory appeal available under section 60 of the Bombay Police Act against the impugned order.

3. Coming to the first submission advanced by learned APP, it is not in dispute that the petitioner has not exhausted the remedy of statutory appeal available under section 60 of the Bombay Police Act against the impugned order. The say of the petitioner that the appeal could not be preferred in time and that there is no provision for condonation of delay in filing the appeal under section 60 of the Bombay Police Act, does not deserve any credence for the simple reason that the petitioner could have filed an appeal with the delay condonation application, and if the delay was not condoned, then the petitioner could have shown his bonafides by saying that he attempted to exhaust the remedy of appeal available under section 60 of the Bombay Police Act. In this regard reliance has been placed on the decision in the case of JAWAHER PANALAL vs. SUB DIVISIONAL MAGISTRATE & ANOTHER, 3 GLR (1962) Pg. 1041, and contended that non availing of alternative remedy would not bar the jurisdiction of the High Court under Article 226 of the Constitution of India but the same may be taken into consideration while exercising the discretion under Article 226 of the Constitution of India. It has been observed by the Division Bench that, "the fact that the petitioner had not filed an appeal, although he was entitled to file one, by itself, does not disentitle him to a consideration of his case, except that, that may be one of the considerations that ultimately may weigh with the Court when determining the question as to whether the discretion to grant the relief should or should not be exercised in favour of the petitioner and if the petitioner succeeds in showing that the result of the impugned order, being bad in law, is that his fundamental right of freedom of movement is affected, that discretion would necessarily be exercised in favour of the petitioner." I am in agreement with this proposition and the same cannot be disputed.

4. The impugned order is challenged on the ground of non-application of mind in as much as the impugned order externing the petitioner from the contiguous districts over & above Ahmedabad City wherein the petitioner is said to have been indulging in the activities alleged against him. The impugned order provides that the petitioner is externed for a period of two years from the area of the Police Commissioner of City of Ahmedabad,

Ahmedabad (Rural) and districts of Gandhinagar, Kheda and Mehsana, i.e. the contiguous districts. The impugned order suggests that it has been apprehended by the externing authority that the petitioner might operate with the help of his associates while remaining in the contiguous districts and therefore, he is required to be externed even from the contiguous districts, over & above the districts under the jurisdiction of the Commissioner of Police, City of Ahmedabad.

It is submitted by Mr. Prajapati that in the show cause notice it has not been said that the petitioner has associates and that he has been operating with the help of or through the associates. It is further contended that there is no material to show that the petitioner has been operating either himself or through his associates in the contiguous districts as above. As far as the show cause notice is concerned the same does not suggest any allegation or statement to the effect that the petitioner has the associates and that he has been operating with the help or through the associates, nor the show cause notice suggests any allegation to the effect that the petitioner has been indulging in similar or such activities as alleged in the show cause notice even in the contiguous districts wherefrom he has been externed by the impugned order.

In the case of VRAJLAL MOHANLAL vs. DISTRICT MAGISTRATE, RAJKOT AND ANOTHER, 3 GLR (1962) pg. 806, it has been held by the Division Bench of this Court that under section 56 of the Bombay Police Act, the District Magistrate has power to remove or extern a person not only from the district within which the Magistrate has jurisdiction but also from the districts contiguous to his own district. The criterion for passing such an order is provided for in section 56, and there must be some indication in the order itself of the existence of circumstance which would lead to the satisfaction of the authority that it was necessary not only to extern a person from his own district but also from the contiguous districts. Such circumstances must be qua every area or region from which a person is directed to be externed and there must be some material or indication of such material in the order. Thus, it would be seen that the existence of circumstances provided in section 56 in each district is necessary.

In the instant case as far as the contiguous districts are concerned there is no material to show that such circumstances exists in the contiguous districts nor there is any such whisper in the show cause notice as

pointed out earlier.

5. The impugned order has also been challenged on the ground of vagueness in as as in the submission of Mr. Prajapati the show cause notice does not refer to the statement of the witnesses alleging the acts / activities stated in the show cause notice. In the show cause notice it has been alleged that the externee has been indulging in the case of showing deadly weapons to the inhabitants of the area, rickshawallas and businessmen and threatening and beating them and has been extorting money; that the externee is a head strong and a person of cruel nature and has the habit of maneoeuvring the persons. The area mentioned is Chamanpura, and the places are Bapalal Ganchi-ni chawli, Narmadaben-ni chawli, Diwali chawli, Pathlawali chawli and in the surrounding areas in Chamanpura. It is also alleged that the externee has been compelling the persons and businessmen of the area to keep liquor in their houses and the externee has also been indulging in the antisocial activity of bootlegging; that the externee is also alleged to be indulging in the antisocial activity of collecting money illegally from rickshawallas and businessmen. These allegations also found favour with the externing authority in passing the impugned order.

6. On behalf of the petitioner reliance has been placed on the decision in the case of ASHWIN CHANDULAL JAISWAL Vs. DEPUTY COMMISSIONER OF POLICE, VADODARA AND ANOTHER, 1990 (1) GLH, pg. 314, wherein the Division Bench while dealing with section 59 of Bombay Police Act observed that ' if at all any cases were filed, either under the Prohibition Act or under Chapter XVI of the Indian Penal Code, that fact should have bene stated in the notice. In absence of any such clear and specific allegations, the notice should be termed as vague and that has deprived of the reasonable opportunity of tendering the explanation'. It is observed in para-9 that, 'It is not stated in the notice that the statements of the witnesses were recorded by the police. If at all any such statements would have been recorded and intended to be relied upon, at least, reference of the statements, without disclosing the names, with the time and place of such alleged illegal activities of the petitioner should have been made in the notice so that the petitioner could have got an opportunity to explain the said circumstances or lead evidence....." To this, it has been submitted by learned APP that, in the instant case the impugned order is not passed for the cases registered against the externee and that the impugned order came to be passed on account of the allegations shown in the show cause

notice. As far as the allegations in the show cause notice are concerned, the statements of the witnesses have bene recorded and according to the learned APP the same has been referred to in the show cause notice.

It is further submitted that the externee has been indulging in the said acts from October 2002 onwards. It is not disputed that any specific time or date or specific alleged incident has been referred in the show cause notice, nor the show cause notice suggests any time or specific incident allegedly committed by the externee. The show cause notice is dated 23-12-2002 whereas the acts alleged are from October 2002 onwards, the time gap is little over two months. Looking to the time gap between October 2002 and show cause notice dated 23-12-2002 not mentioning a particular month or date would be of no significance and the notice cannot be said to suffer from the vice of vagueness.

7. In the case of RANCHHOD RAMJI MACHI Vs. B.J. GADHVI, DY. POLICE COMMISSIONER, SURAT & ANR. 1987 (1) GLR pg. 1, while considering provisions of section 56 and 59 of the Bombay Police Act the Division Bench held that " the notice for externment should contain the period during which the acts are said to have been committed as well as the area where they seem to have been committed. Failure to mention in the notice the period during which such acts are said to have been committed will definitely vitiate such notice issued by the externing authority. "

Thus it would be seen that, what is required to be mentioned in the show cause notice is the period during which the acts are said to have been committed an the area where such acts are said to have been committed. In the instant case both the conditions are complied with in as much as in the show cause notice the area of operation i.e. the chawlies and the period October 2002 onwards has been mentioned, and therefore the show cause notice cannot be said to be suffering from the vice of any vagueness.

8. It is submitted by Mr. Prajapati that as the petitioner could not have been externed from the contiguous districts, the whole order would be vitiated for non application of mind by the externing authority. In this regard reliance is placed on the decision in the case of (Shri) HUSSAINMIYA @ JAGO RAZAKMIYA QADRI Vs. STATE OF GUJARAT & ORS. reported in 1999 (2) GLH, pg. 786. This submission of Mr. Prajapati, answer is to be found in the decision in the case of Vrajlal Mohanlal Vs.

District Magistrate, Rajkot (supra), wherein the Division Bench in categorical terms held that with out affecting the valid part of the order, that part of the order which is bad in law can be safely set aside. It is further observed that, part of the order which refers to the externment of the petitioner from district contiguous to the district of Rajkot is invalid for the reasons already set out, but the order of externment directing the petitioner to remove himself from the district of Rajkot was valid and enforceable by the authority.

This would mean that the part of the impugned order externing the petitioner from contiguous districts, i.e. Ahmedabad (Rural), Gandhinagar, Kheda and Mehsana being bad in law cannot be enforced by the authority.

9. Thus, it will be seen from the above that the impugned order is liable to be quashed and set aside partly to the extent of externing the petitioner from the contiguous districts of Ahmedabad (Rural), Gandhinagr, Kheda and Mehsana.

10. In the result, the petition is partly allowed. Rule to the extent the impugned order externing the petitioner from contiguous districts of Ahmedabad (Rural), Gandhinagar, Kheda and Mehsana is set aside and quashed. However, the order externing the petitioner from Ahmedabad City will stand.

Petition disposed of accordingly.

Dt: 22-1-2004 (N.G. Nandi, J)

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